

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHRISTIAN GARCIA HERRERA,

Plaintiff.

V.

NO. 2:19-CV-0094-TOR

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

KEVIN K. MCALEENAN, Acting
Secretary, Department of Homeland
Security, LOREN MILLER, Director,
Nebraska Service Center, U.S.
Citizenship and Immigration Services,
KENNETH T. CUCCINELLI, Acting
Director, U.S. Citizenship and
Immigration Services, MATTHEW T.
ALBENCE, Acting Director, U.S.
Immigration and Customs
Enforcement, CHRISTA STOCK,
Spokane Field Office Director, U.S.
Citizenship and Immigration Services.

Defendants.

BEFORE THE COURT is Defendants' Motion to Dismiss (ECF No. 15).

This matter was Submitted for consideration without oral argument. The Court has

1 reviewed the record and files herein, and is fully informed. For the reasons
2 discussed below, Defendants' Motion to Dismiss (**ECF No. 15**) is **GRANTED**.

3 **BACKGROUND**

4 This case arises from the nonrenewal of Plaintiff Christian Garcia Herrera's
5 deferred action status under Deferred Action for Childhood Arrivals ("DACA").

6 The following facts are drawn from Plaintiff's Complaint and construed in
7 the light most favorable to Plaintiff. *Schwarz v. United States*, 234 F.3d 428, 436
8 (9th Cir. 2000). Plaintiff is 21 years old and currently resides in Tonasket,
9 Washington. ECF No. 1 at 6, ¶ 27. Plaintiff was brought to this country from
10 Mexico in 1998 when he was 1 year old. *Id.* Plaintiff completed junior high
11 school, where he excelled academically, and graduated from high school in
12 Tonasket in June 2016. *Id.* at 10, ¶ 43. Following graduation, Plaintiff began
13 working as a firefighter for Washington's Department of Natural Resources
14 ("DNR"). *Id.* at ¶ 44. Plaintiff hopes to one day work in law enforcement. *Id.* at
15 2, ¶ 3.

16 Plaintiff has been granted deferred action status under DACA for the past six
17 years. Plaintiff first received deferred status under DACA in January 2013, and his
18 subsequent renewal applications were approved in 2015 and 2017. *Id.* at 11, ¶ 50.
19 Plaintiff also applied for and received work authorization in conjunction with the
20 grants of deferred action. Plaintiff's most recently approved renewal application

1 extended his deferred action status and work authorization through February 13,
2 2019. *Id.*

3 On October 29, 2018, Plaintiff applied to renew his deferred action status
4 and work authorization. *Id.* at 12, ¶ 51. Though Plaintiff’s circumstances
5 regarding his eligibility for DACA remained unchanged, as he continued to satisfy
6 the program’s educational and residency requirements and has no criminal history
7 whatsoever, USCIS denied Plaintiff’s renewal application on November 30, 2018.
8 *Id.* at 4, ¶ 19; 12, ¶ 51. The November 2018 denial letter did not identify the
9 factors USCIS considered or provide a detailed account of the reasons for USCIS’s
10 decision, aside from stating: “You have not established that you warrant a
11 favorable exercise of prosecutorial discretion.” ECF No. 4-20.

12 On January 14, 2019, Plaintiff submitted another renewal application to
13 USCIS, which included additional evidence regarding Plaintiff’s success in school
14 and his work as a firefighter. ECF No. 1 at 12, ¶ 52. However, on February 5,
15 2019, Plaintiff’s renewal application was again denied by USCIS. *Id.* According
16 to Plaintiff, mirroring the November 2018 denial letter, the February 2019 denial
17 letter simply stated that Plaintiff did not establish that he warranted a favorable
18 exercise of prosecutorial discretion, without noting any positive or negative factors
19 considered in the decision-making process. *See* ECF No. 4-23. Following the
20 denial of his renewal application, Plaintiff’s grants of deferred action status and

1 employment authorization officially expired on February 13, 2019. ECF No. 1 at
2 11, ¶ 50.

3 On March 25, 2019, Plaintiff initiated this action for declaratory and
4 injunctive relief against the following Defendants: Loren Miller, in his official
5 capacity as Director of USCIS, Nebraska Service Center; Kenneth T. Cuccinelli, in
6 his official capacity as Acting Director of USCIS; Thomas D. Homan, in his
7 official capacity as Acting Director of the U.S. Immigration and Customs
8 Enforcement (“ICE”)¹; Chrysta Stock, in her official capacity as Spokane Field
9 Office Director, USCIS; and Kevin K. McAleenan, in his official capacity as
10 Acting Secretary of the Department of Homeland Security (“DHS”). ECF No. 1 at
11 6, ¶¶ 28-32 . Plaintiff contends that “[t]he government’s decisions to deny the
12 renewal of Mr. Garcia Herrera’s DACA status, without meaningful explanation or
13 process, and in violation of the program’s enumerated eligibility criteria, violate
14 the [APA] . . . as well as the Due Process Clause of the Fifth Amendment to the

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¹ Pursuant to Federal Rule of Civil Procedure 25(d), the Court substitutes
17 Acting Director of USCIS, Kenneth T. Cuccinelli, for his predecessor, former
18 Director of USCIS, L. Francis Cissna, and substitutes Acting Director of ICE,
19 Matthew T. Albence, for his predecessor, former Acting Director of ICE, Thomas
20 D. Homan.

1 U.S. Constitution.” *Id.* at 5, ¶ 22. As stated in his Complaint, Plaintiff specifically
2 asks this Court to (1) “declare the government’s actions unlawful,” (2) “order that
3 the government re-adjudicate his application for DACA under the program’s
4 existing eligibility criteria using a fair procedure,” and (3) “comply with its own
5 rules and restore his DACA, pending the outcome of the government’s decisions.”
6 *Id.* at ¶ 23.

7 On April 18, 2019, Plaintiff filed a Motion for Temporary Restraining Order
8 and/or Preliminary Injunction. ECF No. 4. Plaintiff sought an order from this
9 Court to temporarily enjoin the denial of Plaintiff’s DACA renewal application
10 pending an eligibility determination that comports with the Administrative
11 Procedure Act (“APA”), 5 U.S.C. § 706(2)(A), and the Due Process Clause of the
12 Fifth Amendment. ECF No. 4. On May 2, 2019, Defendants collectively filed a
13 response opposing Plaintiff’s motion (ECF No. 9), and Plaintiff timely replied
14 (ECF No. 11).

15 On May 8, 2019, the Court denied Plaintiff’s Motion for Temporary
16 Restraining Order and/or Preliminary Injunction. ECF No. 14. Specifically, the
17 Court found it had jurisdiction to review Plaintiff’s claim, but that Plaintiff was not
18 entitled to injunctive relief because he could not show he was likely to succeed on
19 the merits. *Id.* at 9-18.
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1 On June 10, 2019, Defendants filed a Motion to Dismiss. ECF No. 15. On
2 July 1, 2019, Plaintiff filed a response opposing the motion, ECF No. 16, and
3 Defendants timely replied, ECF No. 17.

4 **DISCUSSION**

5 **A. The DACA Program**

6 The Court previously summarized the DACA program in its Order Denying
7 Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction.
8 ECF No. 14. On June 15, 2012, former Secretary of Homeland Security Janet
9 Napolitano announced the creation of the DACA program. ECF No. 4-4
10 ("Napolitano Memo"). In her memorandum, Secretary Napolitano provided DHS
11 with guidelines regarding the exercise of its prosecutorial discretion in the
12 enforcement of "the Nation's immigration laws against certain young people who
13 came to this country as children and know only this country as a home." *Id.* at 1.
14 The Napolitano Memo lists the following five criteria that "should be satisfied
15 before an individual is considered for an exercise of prosecutorial discretion
16 pursuant to this memorandum":

- 17 • came to the United States under the age of sixteen;
- 18 • has continuously resided in the United States for at least five years
19 preceding the date of this memorandum and is present in the
United States on the date of this memorandum;
- 20 • is currently in school, has graduated from high school, has
obtained a general education development certificate, or is an

1 honorably discharged veteran of the Coast Guard or Armed Forces
2 of the United States;

- 3
- 4 • has not been convicted of a felony offense, a significant
5 misdemeanor offense, multiple misdemeanor offenses, or
6 otherwise poses a threat to national security or public safety; and
7
 - 8 • is not above the age of thirty.

9

10 *Id.* Individuals must also pass a criminal background check to be eligible for
11 DACA. *Id.* at 2. If a DACA applicant satisfies these eligibility criteria, USCIS
12 may grant the applicant deferred action “on a case-by-case basis.” *See* ECF No. 4-
13 8 at 3 (“DACA FAQs”). Under the DACA program, deferred action is provided
14 for a renewable period of two years, and DACA recipients are eligible to apply for
15 work authorization during periods of deferred action. *Id.* at 3.

16 The National Standard Operating Procedures (“SOP”) issued by DHS
17 describe the procedures to be followed in adjudicating DACA requests and
18 terminating DACA status. *See* ECF No. 4-24 at 2. The SOP is applicable to all
19 personnel performing adjudicative functions that relate to DACA processing. *Id.*
20 Particularly relevant here are the SOP procedures that apply to the adjudication of
DACA renewal requests. Chapter 8 of the SOP, entitled “Adjudication of The
DACA Request,” provides the following guidelines for adjudicators:

Officers will **NOT** deny a DACA request solely because the DACA requestor failed to submit sufficient evidence with the request (unless there is sufficient evidence in our records to support a denial). As a

1 matter of policy, officers will issue an RFE [Request for Evidence] or
2 a Notice of Intent to Deny (NOID).

3 If additional evidence is needed, issue an RFE whenever possible.

4 When an RFE is issued, the response time given shall be 87 days.

5 ***

6 When a NOID is issued, the response time given shall be 33 days.

7 ECF No. 4-24 at 3. Currently, the DACA SOP applies to all requests to renew
8 deferred action status under DACA.²

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10 ² In September 2017, former Attorney General Jeff Sessions rescinded DACA
11 based on his determination that the program was an unconstitutional exercise of
12 authority by the Executive Branch. A wave of litigation followed, resulting in
13 several nationwide preliminary injunctions issued by district courts around the
14 country, including the Northern District of California. *See Regents of Univ. of*
15 *California v. United States Dept. of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D.
16 Cal. 2018). The Ninth Circuit affirmed the preliminary injunction issued in the
17 Northern District of California on November 8, 2018. *See Regents of the Univ. of*
18 *California v. United States Dept. of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018).
19 Pursuant to the injunction, USCIS must “maintain the DACA program on a
20 nationwide basis on the same terms and conditions as were in effect before the

1 **B. Motion to Dismiss for Lack of Jurisdiction**

2 Defendants move to dismiss Plaintiff's complaint for lack of subject matter
3 jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). ECF No. 15 at 14-20. Plaintiff's
4 complaint asserts federal question jurisdiction exists under 28 U.S.C. § 1331
5 because Plaintiff's claims are brought under the U.S. Constitution and the
6 Administrative Procedure Act. ECF No. 1 at 5, ¶ 24. However, Defendants
7 challenge this Court's ability to review the revocation of Plaintiff's deferred action
8 status based on both the Immigration and Nationality Act ("INA"), as amended by
9 the REAL ID Act, 8 U.S.C. § 1252(g), and the APA, 5 U.S.C. § 701(a)(2). ECF
10 No. 15 at 14-20. Defendants' arguments are duplicative of those raised at the TRO
11 stage. *See* ECF No. 9. As the Court already determined in its Order Denying
12 Plaintiff's Motion for TRO and/or Preliminary Injunction, neither provision
13 Defendants identify deprive this Court of jurisdiction to review Plaintiff's claim.
14 ECF No. 14.

15 1. *Legal Standard*

16 Federal Rule of Civil Procedure 12(b)(1) permits a party to seek dismissal of
17 an action for lack of subject matter jurisdiction. A defendant may challenge
18

19 rescission on September 5, 2017, including allowing DACA enrollees to renew
20 their enrollments" *Regents*, 279 F. Supp. 3d at 1048-49.

1 subject matter jurisdiction in one of two ways: through a “facial attack” or a
2 “factual attack.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). A facial
3 attack accepts the truth of the plaintiff’s allegations but challenges the sufficiency
4 of the complaint’s allegation to invoke federal jurisdiction whereas a factual attack
5 challenges the factual existence of federal jurisdiction. *See id.* Here, Defendants’
6 challenge raises purely legal questions and does not challenge Plaintiff’s factual
7 assertions. ECF No. 15. Accordingly, the Court considers the motion by
8 evaluating the complaint on its face. *See Safe Air for Everyone v. Meyer*, 373 F.3d
9 1035, 1039 (9th Cir. 2004).

10 2. *INA*

11 Defendants argue § 1252(g) of the INA precludes this Court from reviewing
12 Plaintiff’s claim. ECF No. 15 at 14-16. Section 1252(g) of the INA, as amended
13 by the REAL ID Act, provides that “no court shall have jurisdiction to hear any
14 cause or claim by or on behalf of any alien arising from the decision or action by
15 the Attorney General to commence proceedings, adjudicate cases, or execute
16 removal orders against any alien under this chapter.” 8 U.S.C. § 1252(g). The
17 Supreme Court has explained that § 1252(g) is “directed against a particular evil:
18 attempts to impose judicial constraints upon prosecutorial discretion.” *Reno v.*
19 *American-Arab Anti-Discriminatory Committee*, 525 U.S. 471, 487 n.9 (1999)

1 (“AADC”). However, the Court emphasized that its reading of § 1252(g) was
2 narrow and applied to “only a limited subset of deportation claims.” *Id.* at 486.

3 Defendants argue that Plaintiff’s claims are precluded by § 1252(g) because
4 the decision to grant or deny DACA status is an exercise of the Government’s
5 prosecutorial discretion. ECF No. 15 at 14-16. “[C]hallenges to individual ‘no
6 deferred action’ decisions … fall exactly within Section 1252(g) as interpreted by
7 the Court in *AADC*.¹” *Regents*, 908 F.3d at 504. However, as the Court previously
8 explained and as Plaintiff’s briefing on the instant motion clarifies, Plaintiff’s
9 challenge is not to the ultimate fact that his DACA renewal was not granted;
10 instead, he challenges Defendants’ alleged failure to follow agency procedure
11 when making the decision to deny Plaintiff’s application. *See* ECF No. 1 at 13-14,
12 ¶¶ 56-67; ECF No. 16 at 2-3. This kind of procedural challenge does not fall
13 within the scope of the limited discretionary actions the Court cannot review. *See*
14 *Medina v. U.S. Dept. of Homeland Sec.*, No. C17-0218RSM, 2017 WL 5176720, at
15 *6-*8 (W.D. Wash. Nov. 8, 2017) (INA does not strip court of jurisdiction to
16 review claim that DACA status was terminated in violation of internal policies and
17 procedures); *Torres v. U.S. Dept. of Homeland Sec.*, No. 17CV1840 JM, 2017 WL
18 4340385, at *4 (S.D. Cal. Sept. 29, 2017) (same). Thus, § 1252(g) does not
19 deprive the Court of jurisdiction to consider Plaintiff’s claims.
20

1 Defendants attempt to reframe the issue, arguing that the purpose of
2 Plaintiff's claim is to reverse the decision denying his DACA renewal, which is a
3 matter of agency discretion. ECF No. 15 at 14. Even if Plaintiff's desired
4 outcome, should he be granted reconsideration of his renewal application, would
5 be that his application would be granted, the face of the complaint seeks relief for
6 alleged failures to follow agency procedure. ECF No. 1 at 13-14, ¶¶ 56-67; *see*
7 *Safe Air*, 373 F.3d at 1039. Therefore, § 1252(g) does not bar judicial review of
8 Plaintiff's claim.

9 3. *APA*

10 Defendants also contend the APA precludes judicial review of this case.
11 ECF No. 15 at 16-20. The APA permits judicial review of agency actions where
12 “there is no other adequate remedy in a court.” 5 U.S.C. § 704. However, the
13 APA expressly precludes review of agency decisions that are “committed to
14 agency discretion by law.” 5 U.S.C. § 701(a)(2). This jurisdictional bar applies
15 when the reviewing court “would have no meaningful standard against which to
16 judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830
17 (1985). But where there are “statutes, regulations, established agency policies, or
18 judicial decisions that provide a meaningful standard against which to assess”
19 agency action, jurisdiction is not barred. *Mendez-Gutierrez v. Ashcroft*, 340 F.3d
20 865, 868 (9th Cir. 2003).

1 Here, Plaintiff alleges Defendants failed to comply with the SOP while
2 adjudicating his DACA renewal application. *See* ECF No. 1 at 12-14, ¶¶ 51-67;
3 ECF No. 16 at 8-10. The SOP establish procedures by which DHS will review
4 DACA applications and renewal applications. *See* ECF No. 4-24 at 2. These
5 procedures provide a legal standard against which this Court can consider
6 Defendants' actions. *Heckler*, 470 U.S. at 830; *see also Alcaraz v. I.N.S.*, 384 F.3d
7 1150, 1161 (9th Cir. 2004) (finding APA jurisdictional bar did not apply to agency
8 action challenged as contrary to INS policy memoranda); *Inland Empire–*
9 *Immigrant Youth Collective v. Duke*, No. EDCV 17-2048 PSG, 2017 WL 5900061,
10 at *3-*4 (C.D. Cal. Nov. 20, 2017) (DACA SOP provide “a meaningful standard
11 on which to base the agency’s decision,” so APA’s jurisdiction-stripping provision
12 did not apply to challenge to DACA termination); *Medina*, 2017 WL 5176720 at
13 *8 (“Defendants’ alleged failure to follow the procedures detailed in the DACA
14 SOP does not implicate agency discretion.”). Therefore, the APA does not prohibit
15 this Court from considering Plaintiff’s claim.

16 Defendants contend that the APA and *Heckler* specifically preclude judicial
17 review of the agency action that Plaintiff challenges here. ECF No. 15 at 16-20.
18 Again, the flaw in Defendants’ argument is their failure to distinguish between
19 challenges to an agency’s ultimate discretionary decision and challenges to an
20 agency’s alleged failure to follow its own administrative procedures. The fact that

1 USCIS has the ultimate discretionary authority to grant or deny an application for
2 deferred action under DACA does not mean that every determination made by
3 USCIS regarding the application are discretionary and therefore not subject to
4 judicial review. Because Plaintiff challenges Defendants' adherence to the DACA
5 SOP, rather than the discretionary decision to deny his DACA application, judicial
6 review is not precluded.

7 In sum, the jurisdiction-stripping provisions of 8 U.S.C. § 1252(g) and 5
8 U.S.C. § 701(a) do not prevent this Court from determining whether Defendants
9 complied with their non-discretionary procedures. Because the Court concludes
10 that it has jurisdiction over this action, it now turns to Defendants' Rule 12(b)(6)
11 motion.

12 **C. Motion to Dismiss for Failure to State a Claim**

13 *1. Legal Standard*

14 Defendants move to dismiss Plaintiff's complaint for failure to state a claim
15 pursuant to Fed. R. Civ. P. 12(b)(6). ECF No. 15 at 20-23. A motion to dismiss
16 for failure to state a claim "tests the legal sufficiency" of the plaintiff's claims.
17 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To withstand dismissal, a
18 complaint must contain "enough facts to state a claim to relief that is plausible on
19 its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has
20 facial plausibility when the plaintiff pleads factual content that allows the court to

1 draw the reasonable inference that the defendant is liable for the misconduct
2 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). This
3 requires the plaintiff to provide “more than labels and conclusions, and a formulaic
4 recitation of the elements.” *Twombly*, 550 U.S. at 555. While a plaintiff need not
5 establish a probability of success on the merits, he or she must demonstrate “more
6 than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at
7 678.

8 When analyzing whether a claim has been stated, the Court may consider the
9 “complaint, materials incorporated into the complaint by reference, and matters of
10 which the court may take judicial notice.” *Metzler Inv. GMBH v. Corinthian
Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (*citing Tellabs, Inc. v. Makor
Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). A complaint must contain “a
13 short and plain statement of the claim showing that the pleader is entitled to relief.”
14 Fed. R. Civ. P. 8(a)(2). A plaintiff’s “allegations of material fact are taken as true
15 and construed in the light most favorable to the plaintiff[,]” however “conclusory
16 allegations of law and unwarranted inferences are insufficient to defeat a motion to
17 dismiss for failure to state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,
18 1403 (9th Cir. 1996) (citation and brackets omitted).

19 In assessing whether Rule 8(a)(2) has been satisfied, a court must first
20 identify the elements of the plaintiff’s claim(s) and then determine whether those

1 elements could be proven on the facts pled. The court may disregard allegations
2 that are contradicted by matters properly subject to judicial notice or by exhibit.
3 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The court
4 may also disregard conclusory allegations and arguments which are not supported
5 by reasonable deductions and inferences. *Id.*

6 The Court “does not require detailed factual allegations, but it demands
7 more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*,
8 556 U.S. at 662. “To survive a motion to dismiss, a complaint must contain
9 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible
10 on its face.’” *Id.* at 678 (citation omitted). A claim may be dismissed only if “it
11 appears beyond doubt that the plaintiff can prove no set of facts in support of his
12 claim which would entitle him to relief.” *Navarro*, 250 F.3d at 732.

13 2. *Claim One – APA Adjudication*

14 Plaintiff’s first claim for relief alleges Defendants’ adjudication of Plaintiff’s
15 DACA renewal application was arbitrary and capricious and contrary to law for
16 failing to follow the agency’s own adjudication procedures. ECF No. 1 at 12-13,
17 ¶¶ 51-59. The Court may overturn agency action that is “arbitrary, capricious, an
18 abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §
19 706(2)(A). Plaintiff alleges Defendants’ failure to follow the SOP when
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1 adjudicating his DACA renewal application was arbitrary and capricious.³ ECF
2 No. 1 at 13, ¶¶ 58-59; ECF No. 16 at 8-10.

3 Specifically, Plaintiff contends the DACA SOP required Defendants to issue
4 either an RFE or NOID to Plaintiff before denying his claim. ECF No. 16 at 8-9.
5 However, the text of the SOP that Plaintiff cites as evidence establishing his
6 entitlement to an RFE or NOID makes clear that an RFE or NOID should be issued
7 when the DACA applicant “failed to submit sufficient evidence with the request.”
8 ECF No. 4-24 at 3. In this case, Plaintiff has alleged no facts to support a
9 conclusion that Plaintiff did not submit sufficient evidence in support of his
10 application; instead, the facts alleged indicate the agency considered Plaintiff’s
11 application materials and determined to exercise its discretion to deny Plaintiff’s
12 renewal application. *See* ECF Nos. 4-20; 4-23. Although Plaintiff’s complaint
13 seeks relief for a violation of the SOP, Plaintiff does not identify any portion of the
14

15 ³ Defendants request the Court take judicial notice of the April 2013 SOP and
16 the Form I-821D Instructions. ECF No. 15 at 13-14. Plaintiff does not object.
17 ECF No. 16 at 7-8. Accordingly, the Court takes notice of the SOP and Form I-
18 821D Instructions. U.S. Dept. of Homeland Security, National Standard Operating
19 Procedures: Deferred Action for Childhood Arrivals (Apr. 4, 2013), *available at*
20 https://cliniclegal.org/sites/default/files/attachments/daca_sop_4-4-13.pdf.

1 SOP that requires an RFE or NOID to be issued when the applicant has submitted
2 sufficient supporting information but the agency exercises its discretion to deny the
3 application. ECF No. 1 at 13, ¶¶ 56-59; ECF No. 16 at 8-10.

4 Similarly, Plaintiff argues the SOP should have required Plaintiff's renewal
5 application be forwarded for supervisory review. ECF No. 16 at 9-10. The SOP
6 directs that applications that are denied solely because of an exercise of discretion
7 should be referred for supervisory review. SOP at 106. However, neither
8 Plaintiff's complaint nor Plaintiff's briefing on the instant motion alleges any facts
9 to support a finding that Plaintiff's application was not forwarded for supervisory
10 review. ECF No. 1 at 11-13, ¶¶ 50-67; ECF No. 16 at 9-10. Indeed, at the TRO
11 hearing, Plaintiff conceded that he was merely speculating that his application was
12 not given supervisory review. Plaintiff's allegations rise to little more than
13 "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Iqbal*, 556 U.S.
14 at 662.

15 Plaintiff has not alleged "enough facts to state a claim to relief that is
16 plausible on its face." *Twombly*, 550 U.S. at 570. Accordingly, Defendants'
17 motion to dismiss for failure to state a claim as to Plaintiff's first claim is **granted**.

18 3. *Claim Two – APA Rulemaking*

19 Plaintiff's second claim for relief alleges Defendants' denial of Plaintiff's
20 DACA renewal application constitutes administrative rulemaking that failed to

1 comply with the APA's notice and comment requirements. ECF No. 1 at 13-14,
2 ¶¶ 60-63. At the TRO stage, Plaintiff made no argument in the motion papers or
3 during the motion hearing that he is likely to succeed on the merits of this claim.
4 In response to the instant Motion to Dismiss, Plaintiff similarly has not advanced
5 his APA notice and comment arguments. Plaintiff has not alleged "enough facts to
6 state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.
7 Accordingly, Defendants' motion to dismiss for failure to state a claim as to
8 Plaintiff's second claim is **granted**.

9 4. *Claim Three – Due Process*

10 Plaintiff's third claim for relief alleges Defendants' denial of Plaintiff's
11 DACA renewal application without adequate notice, explanation, or opportunity to
12 respond deprived Plaintiff of a liberty or property interest without due process of
13 law, in violation of the Fifth Amendment. ECF No. 1 at 14, ¶¶ 64-67.

14 "A threshold requirement to a substantive or procedural due process claim is
15 the plaintiff's showing of a liberty or property interest protected by the
16 Constitution." *Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56,
17 62 (9th Cir. 1994). To succeed on his due process claim, Plaintiff must establish
18 that he has "a legitimate claim of entitlement" in the renewal of deferred action
19 status under DACA. *Id.* at 63. However, "[a] person's belief of entitlement to a
20 government benefit, no matter how sincerely or reasonably held, does not create a

1 property right if that belief is not mutually held by the government.” *Gerhart v.*
2 *Lake Cty., Mont.*, 637 F.3d 1013, 1020 (9th Cir. 2011).

3 Here, Plaintiff has not alleged any facts to establish that he has a legitimate
4 claim of entitlement to renewal of his DACA status. ECF No. 1 at 7-14, ¶¶ 33-67;
5 ECF No. 16 at 7-10. To the contrary, as the Ninth Circuit has recognized,
6 Plaintiff’s argument is undercut by the Napolitano Memo and the DACA FAQs.
7 See *Regents*, 908 F.3d at 515. The Napolitano Memo expressly states that deferred
8 action “confers no substantive right, immigration status or pathway to citizenship.”
9 ECF No. 4-4 at 3. The DACA FAQs clarify that “USCIS retains the ultimate
10 discretion to determine whether deferred action is appropriate in any given case
11 even if the guidelines are met,” and an individual’s “deferred action may be
12 terminated at any time, with or without a Notice of Intent to Terminate, at DHS’s
13 discretion.” ECF No. 4-8 at 7, 16.

14 Even construing the record in the light most favorable to Plaintiff, Plaintiff
15 has not alleged “enough facts to state a claim to relief that is plausible on its face.”
16 *Twombly*, 550 U.S. at 570. Accordingly, Defendants’ motion to dismiss for failure
17 to state a claim as to Plaintiff’s third claim is **granted**.

18 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 19 1. Pursuant to Federal Rule of Civil Procedure 25(d), the Clerk of Court
20 shall substitute, on the docket sheet, Acting Director of USCIS, Kenneth

- 1 T. Cuccinelli, for his predecessor, former Director of USCIS, L. Francis
2 Cissna; and shall substitute Acting Director of ICE, Matthew T. Albence,
3 for his predecessor, former Acting Director of ICE, Thomas D. Homan.
4 2. Defendants' Motion to Dismiss (ECF No. 15) is **GRANTED**. This case
5 is **DISMISSED**.
6 3. The deadlines, hearings and trial date are **VACATED**. Each party to
7 bear its own costs and expenses.

8 The District Court Executive is directed to enter this Order, furnish copies to
9 counsel, enter judgment for Defendants, and **close** the file.

10 **DATED** September 3, 2019.



11 A handwritten signature in blue ink that reads "Thomas O. Rice".
12 THOMAS O. RICE
13 Chief United States District Judge
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